

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHARLES S. LONGSHORE,

Plaintiff,

v.

RONALD E. SERGI (Attorney at Law),

Defendant.

No. C11-5248 BHS/KLS

ORDER TO AMEND OR SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff's application to proceed *in forma pauperis* (ECF No. 1) is pending. On March 29, 2011, Plaintiff filed his proposed civil rights complaint. ECF No. 1-1. After reviewing Plaintiff's proposed complaint, the court finds that it is deficient.

**DISCUSSION**

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See

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1 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it  
2 lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v.*  
3 *Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). A complaint or portion thereof, will be  
4 dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual  
5 allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that  
6 all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct.  
7 1955, 1965 (2007)(citations omitted). In other words, failure to present enough facts to state a  
8 claim for relief that is plausible on the face of the complaint will subject that complaint to  
9 dismissal. *Id.* at 1974.

11 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct  
12 complained of was committed by a person acting under color of state law and (ii) the conduct  
13 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the  
14 United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981),  
15 *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the  
16 appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
17 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

19 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can  
20 be granted. Plaintiff purports to sue his court appointed defense counsel for breaching his  
21 attorney-client privilege when discussing a plea agreement with the prosecuting attorney. ECF  
22 No. 1-1, p. 2. Plaintiff asks that the prosecuting attorney, his defense counsel, and a Superior  
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1 Court Judge be removed from his Lewis County criminal case and that he be given “all new  
2 process.” He also seeks damages of \$500.00 from Mr. Sergi.<sup>1</sup>

3 When a person confined by government is challenging the very fact or duration of his  
4 physical imprisonment, and the relief he seeks will determine that he is or was entitled to  
5 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ  
6 of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages  
7 for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions  
8 whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove  
9 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,  
10 declared invalid by a state tribunal authorized to make such determination, or called into  
11 question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v.*  
12 *Humphrey*, 512 U.S. 477, 486-87 (1994).

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14 In addition, prisoners in state custody who wish to challenge the length of their  
15 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust  
16 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting  
17 the highest state court available with a fair opportunity to rule on the merits of each and every  
18 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481  
19 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,  
20 231 (9<sup>th</sup> Cir. 1988).

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25 <sup>1</sup> In another case filed on the same day, Plaintiff seeks to sue Steve Scott, the Mason County Prosecutor, for  
26 breaching his attorney-client privilege in the same Lewis County criminal case. *Longshore v. Scott*, C11-5249RBL.  
In that case he similarly requests a “new process.” ECF No. 1-1, p. 4. An Order to Show Cause similar to this one  
has been entered in C11-5249RBL.

1 State remedies must be exhausted except in unusual circumstances. *Granberry, supra*, at  
2 134. If state remedies have not been exhausted, the district court must dismiss the petition.  
3 *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9<sup>th</sup> Cir. 1988). As a dismissal solely  
4 for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905 F.2d 1318, 1322-23  
5 (9<sup>th</sup> Cir. 1990), it is not a bar to returning to federal court after state remedies have been  
6 exhausted.

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8 Because Plaintiff seeks an earlier release from confinement, his action is not cognizable  
9 under 42 U.S.C. § 1983 and the proper course of action to challenge his incarceration is through  
10 a habeas corpus petition, which he must first file in state court.

11 Moreover, in order to recover under § 1983, a plaintiff must allege and prove that  
12 defendants acted under color of state law to deprive the plaintiff of a right secured by the  
13 Constitution or federal statute. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623  
14 (9<sup>th</sup> Cir.1988). Generally, private parties are not acting under color of state law. See *Price v.*  
15 *Hawaii*, 939 F.2d 702, 707-08 (9<sup>th</sup> Cir.1991). Here, Plaintiff is attempting to sue his trial  
16 counsel. However, it is established that a public defender does not act under color of state law  
17 when performing a lawyer's traditional functions as counsel to a defendant in a criminal  
18 proceeding. *Polk County v. Dodson*, 454 U.S. 312, 317, 325, 102 S.Ct. 445, 70 L.Ed.2d 509  
19 (1981); *Rivera v. Green*, 775 F.2d 1381, 1384 (9<sup>th</sup> Cir.1985).

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21 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff  
22 may file an amended complaint curing, if possible, the above noted deficiencies, or show cause  
23 explaining why this matter should not be dismissed no later than **April 29, 2011**. If Plaintiff  
24 chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C. § 1983, his  
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1 amended complaint shall consist of a short and plain statement showing that he is entitled to  
2 relief, and he must allege with specificity the following:

- 3 1) the names of the persons who caused or personally participated in causing the  
4 alleged deprivation of his constitutional rights;
- 5 2) the dates on which the conduct of each defendant allegedly took place; and
- 6 3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 Plaintiff shall set forth his factual allegations in separately numbered paragraphs. The  
8 amended complaint shall operate as a complete substitute for (rather than a mere supplement to)  
9 the present complaint. Plaintiff shall present his complaint on the form provided by the Court.  
10 The amended complaint must be legibly rewritten or retyped in its entirety, it should be an  
11 original and not a copy, it may not incorporate any part of the original complaint by reference,  
12 and it must be clearly labeled the "First Amended Complaint" and contain the same case number  
13 as this case.  
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15 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
16 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
17 raised herein on or before **April 29, 2011**, the Court will recommend dismissal of this action as  
18 frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under 28 U.S.C.  
19 § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three  
20 or more civil actions or appeals which are dismissed on grounds they are legally frivolous,  
21 malicious, or fail to state a claim, will be precluded from bringing any other civil action or  
22 appeal in forma pauperis "unless the prisoner is under imminent danger of serious physical  
23 injury." 28 U.S.C. § 1915(g).  
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Karen L. Strombom  
United States Magistrate Judge